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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 7
JQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Americh Corporation

Serial No. 75/713,764

Ellsworth R. Roston of Fulwider Patton Lee & Utecht for
applicant.

Hyun (Kenneth) Oh, Trademark Examining Attorney, Law Office
104 (Michael Hamilton, Managing Attorney).

Before Quinn, Hairston and Holtzman, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Americh Corporation
to register the mark AIRBATH for "baths in which water and
air are introduced simultaneously into the baths to provide
for the retention of water in the baths and the formation
of air bubbles at the surface of the water."¹

The Trademark Examining Attorney has refused

¹ Application Serial No. 75/713,764, filed May 25, 1999, alleging
dates of first use of December 1998.

registration under Section 2(e)(1) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, is merely descriptive thereof.

When the refusal was made final, applicant appealed.² Applicant and the Examining Attorney have submitted briefs. An oral hearing was not requested.

The Examining Attorney maintains that the mark sought to be registered is the grammatical equivalent of "bath of air" and that it immediately indicates that applicant's goods "incorporate the use of 'air' in its bathtub or uses 'air' when the purchaser is taking a bath." In support of the refusal, the Examining Attorney submitted four excerpts retrieved from the NEXIS database, and what appears to be portions of a third-party's Web page pulled off the Internet. The Examining Attorney also has relied upon a dictionary listing of the term "bath" showing it defined as "the act of soaking or cleansing the body, as in water or steam; a bathtub." *The American Heritage Dictionary of the*

² The Examining Attorney also issued a final refusal relating to the identification of goods, contending that it was "indefinite." The Examining Attorney's suggested identification used the term "bathtubs" in lieu of "baths." No mention of this refusal was made in the briefs, and both applicant and the Examining Attorney referred to the identification as incorporating the term "baths." In his brief, the Examining Attorney indicated that the only issue on appeal involved mere descriptiveness. In view of the above, the final refusal relating to the identification of goods is considered to be withdrawn.

English Language (3rd ed. 1992).

Applicant contends that the mark is only suggestive of its bath which mixes water and air to produce bubbles in the water. Applicant is critical of the Examining Attorney's NEXIS evidence, contending that the excerpts are from foreign publications.

The Examining Attorney bears the burden of showing that a mark is merely descriptive of the relevant goods. In *re* Merrill, Lynch, Pierce, Fenner, and Smith Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). A mark is descriptive if it "forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods." *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 189 USPQ 759, 765 (2nd Cir. 1976) (emphasis added). See also: *In re Abcor Development Corp.*, 616 F.2d 525, 200 USPQ 215 (CCPA 1978). Moreover, in order to be descriptive, the mark must immediately convey information as to the ingredients, qualities or characteristics of the goods with a "degree of particularity." *Plus Products v. Medical Modalities Associates, Inc.*, 211 USPQ 1199, 1204-1205 (TTAB 1981). See also: *In re Diet Tabs, Inc.*, 231 USPQ 587, 588 (TTAB 1986); *Holiday Inns, Inc. v. Monolith Enterprises*, 212 USPQ 949, 952 (TTAB 1981); and *In re TMS Corp. of the Americas*, 200 USPQ 57, 59 (TTAB 1978).

We find that the applied-for mark, when applied to applicant's goods, is just suggestive. Although the individual words comprising applicant's mark have meanings, the specific combination of these two words results in an incongruous designation which is not merely descriptive of applicant's goods. That is to say, applicant's mark does not convey an immediate quality about the goods with any degree of particularity.

The NEXIS evidence, which forms the primary evidentiary basis of the refusal, is deficient. As applicant is quick to point out, the four excerpts and the one Web page are from foreign sources which do not show the use of the term as it would be viewed by U.S. consumers. See, e.g., *In re Urbano*, 51 USPQ2d 1776, 1778 at n. 3 (TTAB 1999). Even if we were to give this evidence from non-U.S. sources some minimal evidentiary value, it falls short in establishing that the term "air bath" is in common use for goods of the type sold by applicant such that we could conclude that the mark is merely descriptive. *In re The Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994).

The Board has noted on a number of prior occasions that there is a thin line of demarcation between a suggestive and a merely descriptive designation. Although we find that the mark sought to be registered falls in the

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suggestive category, to the extent that the Examining Attorney's arguments cast doubt on our finding, such doubts are to be resolved in applicant's favor. See, e.g., *In re Atavio*, 25 USPQ2d 1361 (TTAB 1992); *In re Morton-Norwich Products, Inc.*, 209 USPQ 791 (TTAB 1981); and *In re Gourmet Bakers, Inc.*, 173 USPQ 565 (TTAB 1972).

Decision: The refusal to register is reversed.

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